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Federal Procedure- Habeas Corpus-Custody as a Prerequisite for Jurisdiction

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FEDERAL PROCEDURE—HABEAS CORPUS—CUSTODY AS A PREREQUISITE FOR JURISDICTION—Having exhausted his state remedies[1] in seeking a reversal[2] of a 1954 conviction for forgery, petitioner applied in May 1956 for a writ of habeas corpus in a federal district court alleging, *inter alia,* that his conviction without benefit of counsel was a denial of due process under the fourteenth amendment. After dismissal by that court and affirmance

[1] Exhaustion of state remedies is a prerequisite to issuance of a writ of habeas corpus by a federal court. 28 U.S.C. § 2254 (1958); Darr v. Burford, 339 U.S. 200 (1950).

[2] Parker v. State, 276 S.W. 2d 533 (Tex. Crim. App. 1955); Parker v. Ellis, Tex. Crim. App. Sept. 21, 1955 (dismissal of petitioner's application for state habeas corpus), *cert. denied,* 350 U.S. 971 (1956).

by the court of appeals,[3] the Supreme Court granted certiorari in March 1959. Pending a decision, petitioner completed his sentence and was released from prison. In a per curiam opinion, *held,* dismissed, four Justices dissenting.[4] In a habeas corpus proceeding the Court is without jurisdiction if the petitioner is not in custody at the time the judgment will become effective. *Parker v. Ellis,* 362 U.S. 574 (1960).

It is not only in the jurisprudence of primitive societies that the substantive law is in danger of being "secreted in the interstices of procedure."[5] In the present case, after almost five years of continuous litigation, the question whether petitioner's constitutional rights were violated was relegated to the "limbo of mootness"[6] because the court felt a procedural requirement had not been met. That this was an unfortunate result few would deny; that it was necessary remains to be seen.

Due to the case or controversy limitation of article III, section 2, of the Constitution it is well settled that the federal courts are unable to decide issues unless framed in a setting where the parties are adverse,[7] the controversy real,[8] the interest substantial,[9] and the issue justiciable.[10] In this context, the relevancy of custody in a criminal case relates to the substantiality of the interest. The Supreme Court has held that a person's interest in removing a moral stigma of a criminal conviction is not sufficient to permit the federal judiciary to decide the case,[11] but completion of the sentence will not render the case moot if it can be shown that collateral legal disabilities, such as a denial of voting rights,[12] will result from an

[3] Parker v. Ellis, 258 F.2d 937 (5th Cir. 1958), *cert. granted,* 359 U.S. 924 (1959).

[4] Justices Harlan and Clark also considered the case moot under the case or controversy requirement of the Constitution because they felt a previous conviction had already destroyed petitioner's civil rights and he had not shown any further impairment. Chief Justice Warren, joined by Justices Black, Douglas and Brennan, dissented on the ground that custody, though necessary to issuance of the writ under 28 U.S.C. § 2241 (1958), is not necesary to the pronouncement of the remedy under 28 U.S.C. § 2243 (1958), which provides that "the Court shall . . . dispose of the matter as law and justice require." Justice Douglas, joined by the Chief Justice, also felt that a *nunc pro tunc* judgment was proper since the delay was caused by the courts without fault of petitioner.

[5] MAINE, EARLY LAW AND CUSTOM 389 (1882); see BORCHARD, DECLARATORY JUDGMENTS (1941); Arnold, *Trial by Combat and the New Deal,* 47 HARV. L. REV. 913 (1934).

[6] Mr. Chief Justice Warren, principal case at 577.

[7] Lord v. Veazie, 49 U.S. (8 How.) 250 (1850); United States v. Johnson, 319 U.S. 302 (1942).

[8] United States v. Evans, 213 U.S. 297 (1909).

[9] Doremus v. Board of Education, 342 U.S. 429 (1952); Massachusetts v. Mellon, 262 U.S. 447 (1923).

[10] These terms are not precise and overlap to a great extent; "justiciable," when not used tautologically, has a connotation of the traditional and appropriate. *E.g.,* United States v. UAW, 352 U.S. 567 (1957) (issue prematurely raised); Georgia v. Stanton, 73 U.S. (6 Wall.) 50 (1867) (issue political). See ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §§ 257-307 (2d ed. Wolfson & Kurland 1951); BORCHARD, *op. cit. supra* note 5, at 29-86; Diamond, *Federal Jurisdiction To Decide Moot Cases,* 94 U. PA. L. REV. 125 (1946); Comment, 103 U. PA. L. REV. 772 (1955).

[11] St. Pierre v. United States, 319 U.S. 41 (1943).

[12] For a list of other legal consequences, see Note, 59 YALE L.J. 786 (1950).

unreversed judgment.[13] It is not clear from the opinions whether a specific present or impending legal disability must be proved[14] or whether it is enough to show, when the crime is serious, the mere possibility of future collateral legal consequences.[15] If the latter view becomes dominant, the moral-stigma limitation may serve only to dismiss the frivolous. However, the import or wisdom of this distinction is not within the scope of this note.[16] It is enough to realize that custody is not a constitutional requirement for a federal court to exercise jurisdiction.[17]

The historic function of the writ of habeas corpus was to prevent detention of persons who had not been convicted by a court of competent jurisdiction.[18] Normally the person for whom the writ was issued was being held without judicial sanction. This circumstance, coupled with the fact that during this period there was little judicial concern over the secondary effects of a judgment, led naturally to the requirement of custody for the writ to issue.[19] However, beginning with *Frank v. Mangrum*[20] in 1915, the trial court's jurisdiction was determined not only by the nature of the subject matter, but also by the manner in which the trial was conducted. After that decision, lack of jurisdiction of the trial court remained a term of pleading, but it became increasingly apparent that the writ would issue whenever "the conviction has been in disregard of the constitutional rights of the accused."[21] Although the exact scope of federal inquiry into state trials in a habeas corpus proceeding is still a live issue,[22] it seems reasonably clear that the issues the Court actually considers "are substantially the same as would be considered on appeal."[23] As a result of this development, the effect of granting the writ is not only to release a person

[13] Fiswick v. United States, 329 U.S. 211, 220 (1946); United States v. Morgan, 346 U.S. 502, 512 (1953); Pollard v. United States, 352 U.S. 354, 358 (1956).

[14] For attitudes of the circuit courts, see Government of Virgin Islands v. Ferrer, 275 F.2d 497 (3d Cir. 1960); Nevers v. United States, 275 F.2d 332 (8th Cir. 1960); Annot., 1 L. Ed. 2d 1876 (1956).

[15] Indeed, in the principal case the dissenters clearly indicated that they are prepared to consider the moral and economic effects. Only Justices Harlan and Clark took issue on this point.

[16] For a compilation of state attitudes on this question, see State v. Huffman, 207 Ore. 372, 297 P.2d 831 (1956); Annot., 87 L. Ed. 1201 (1942).

[17] In their concurring opinion, Justices Harlan and Clark did not object to the principle but felt no collateral legal consequences had been shown.

[18] Felts v. Murphy, 201 U.S. 123 (1906); Crossley v. California, 168 U.S. 640 (1898).

[19] In fact, the emergence of collateral means for attacking criminal judgments, such as habeas corpus and coram nobis, has been instrumental in forcing reconsideration of the secondary effects of convictions, for when direct appeal was the only remedy, persons convicted of serious crimes would still be in prison when the case reached the appellate court.

[20] 237 U.S. 309 (1915). Further expansion occurred in Moore v. Dempsey, 261 U.S. 86 (1923); Johnson v. Zerbst, 304 U.S. 458 (1938); Brown v. Allen, 344 U.S. 443 (1953).

[21] Whaley v. Johnston, 316 U.S. 101, 105 (1942); Note, 61 HARV. L. REV. 657 (1948).

[22] Brown v. Allen, *supra* note 20; Comment, 68 YALE L.J. 98 (1958).

[23] Brown v. Allen, *supra* note 20, at 540 (concurring opinion of Justice Jackson); see Rogge & Gordon, *Habeas Corpus, Civil Rights and the Federal System*, 20 U. CHI. L. REV. 509 (1953).

from prison, but also to relieve him from the collateral consequences of a criminal judgment. Under such circumstances attempts to justify the continuation of the custody requirement are valid only to the extent that the policy factors which initially militated against the extension of the writ beyond its traditional scope continue to have force. Citation of precedent from an era when habeas corpus was a pre-conviction remedy hardly seems adequate.[24]

The early objections to the expanded use of the writ centered on its violation of the policies and principles which underlie the doctrine of res judicata, but present attacks emphasize the impropriety of a lower federal court challenging the proceedings of a state supreme court and the fear of inundating the federal courts with "thousands of groundless, if not fraudulent claims. . . ."[25] It may be argued that these considerations, while not sufficient to outweigh the importance of freeing a man unconstitutionally incarcerated, do justify refusing to consider cases where there is no imprisonment. Though appealing, this approach is too mechanical. Admittedly the expansion of the writ was possible only because of the belief that the freedom of the individual is more important than the dignity of the state court or the workload of the federal courts.[26] Because the writ has developed to the point where there are other constitutionally recognized interests involved, the writ should issue unless its issuance would further interfere with the opposing policies. So considered, even if it is conceded that to remove the custody requirement entirely would place too great a burden on state and federal courts,[27] it does not follow that a writ once applied for may not successfully be pursued despite subsequent release of the petitioner from custody. By requiring custody as a condition of application, the type and number of claims would be limited as effectively as they are now. Yet by retaining jurisdiction despite a later loss of custody, the court can give the same recognition to petitioner's interest which it now does on appeal. Although the distinction between the interests necessary to invoke the judicial process and those necessary to maintain it

[24] Insistence that its decision was dictated by precedent seems unconvincing from the Court which completely rewrote the meaning of jurisdiction in habeas corpus in Moore v. Dempsey, *supra* note 20, and Johnson v. Zerbst, *supra* note 20.

[25] *Report of the Habeas Corpus Committee of the Conference of Chief Justices, August 14, 1954,* quoted in *Hearings on H. R. 5649 Before Subcommittee No. 3 of the House Committee on the Judiciary,* 84th Cong., 1st Sess. 108, 109 (1955). The report is discussed in Pollak, *Proposals To Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ,* 66 YALE, L.J. 50 (1956). *Compare* Moore v. Dempsey, *supra* note 20, at 92 (dissenting opinion of Justice McReynolds) *with* Brown v. Allen, *supra* note 20, at 532 (concurring opinion of Justice Jackson).

[26] For an evaluation of these considerations, *compare* Pollak, *supra* note 25, *with* Parker, *Limiting the Abuse of Habeas Corpus,* 8 F.R.D. 171 (1949).

[27] However, such considerations have not prevented federal courts from reviewing their own judgments even after petitioner has been released from jail. United States v. Morgan, *supra* note 13. Many state courts have a similar practice. State v. Huffman, *supra* note 17; Sanders v. State, 85 Ind. 318, 44 Am. Rep. 29 (1882).

has never received articulate judicial recognition,[28] the evolution of the writ has made such a distinction sound. Indeed, if the adjective law is to remain an instrument for balancing the incessant demands of justice and finality, this refinement is necessary.

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[28] However, the Chief Justice, dissenting in the principal case, was quite articulate in defending this position. Compare the "continuing controversy" doctrine of administrative law. Southern Pac. Terminal Co. v. ICC, 219 U.S. 498 (1910); Diamond, *supra* note 10; Comment, 103 U. PA. L. REV. 772 (1955); Note, 40 COLUM. L. REV. 127 (1940); Note, 53 L. HARV. L. REV. 628 (1940).